IN THE

Supreme Court of the United States

October Term, 1939.

No. 272.

NATIONAL LICORICE COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Two of the important questions presented for determination on this proceeding are whether there was any substantial evidence to support the Board's finding (a) that the Committee was sponsored or dominated by petitioner and (b) that the execution of the individual contracts by the employees was induced by intimidation or coercion practiced by petitioner upon them. We demonstrated in our main brief that there is no evidence to support such findings. The issue thus squarely tendered was to be met by the Board. Our adversary's brief discloses that it has not been met but studiously evaded. The drafts-

man of that brief adopts the technique of *assuming the evidence to exist*, and then by the frequent and unjustifiable use of words such as "illegal interference", "illegal restraints", "illegal limitations", "unlawful attempts", and other prejudicial statements endeavors to create a sinister impression of petitioner's conduct which any impartial consideration of the evidence would utterly reject. A typical example is shown by the footnote on page 23 of the Board's brief to the effect that the signing of the contracts was "a condition of re-employment" of the returning employees. Not only is there not the slightest evidence in the record to support this finding, but the evidence discloses exactly the contrary. Mr. Healey, petitioner's assistant secretary, gave the following *uncontradicted* testimony (R. 585):

> "We also wanted them to know thoroughly—we wanted them to have every man in the plant understand that the signing of this contract was optional. That the continuation of their employment was in no way predicated upon the signing of the contract and that if they (did) or did not, they would not be discriminated against in any way, shape or form."

Further, the record shows that the contract was not negotiated until September 10th, 1937 (R. 697). Prior thereto, and from August 25, 1937 to September 9th, 1937, exactly 109 employees, a substantial majority, had been re-employed (R. 565). Manifestly, the re-employment of those persons could not have been conditioned upon their signing of contracts that were not even in existence at that time.

Likewise, it should be noted that the contract in the present case is not a closed shop contract. No

employee is required, as a condition of employment, to become a party to the labor organization known as the Collective Bargaining Committee of the National Licorice Company (R. 850-857). The Board's finding that the signing of the contracts was a condition of re-employment (R. 884) is another illustration of a finding made in the teeth of the substantial and uncontradicted evidence.

The Alleged Violation of Section 8(5) of the Act in Failing to Bargain With the Union.

The Board discusses in minute detail the bargaining negotiations conducted by petitioner with the Union during July of 1937. That discussion can serve no purpose, since on this review there is no question before the Court as to whether petitioner committed an unfair labor practice by refusing to bargain collectively with the Union under Section 8(5) of the Act. The Circuit Court did not enforce the Board's order directing petitioner to bargain with the Union. It ordered an election to determine whether the Union still represents the men, and if the Union loses the election petitioner is not required to bargain with it (R. 912, 915, 916). The Board has filed no cross-petition for review of this provision in the order of the Circuit Court. Therefore, the most that the Board can hope to receive from this Court is an affirmance of the Circuit Court's order directing the election; hence the mass of evidence in the Board's brief relating to the bargaining serves no purpose but to confuse the issues (see Petitioner's Main Brief, p. 11).

The Board's Defective Charge and Complaint Precluding Any Adjudication Under Sections 8(1) and 8(2) of the Act.

At pages 65, *et seq.* of its brief, the Board discusses petitioner's Point I—the question involving the Board's lack of power to make any order concerning either the September Committee or the September contracts, on the basis of a charge executed on August 2nd, 1937. The Board's points of opposition, with petitioner's replies thereto, are as follows:

First: That petitioner's claim on this subject was not urged before the Board and hence Section 10(e) of the Act precludes consideration thereof by the Court.

We assert that this objection was specifically called to the Board's attention and that it had a full opportunity to correct its erroneous procedure. The record shows (R. 380-381) that while petitioner's counsel was interrogating a witness concerning the contract, the following appeared:

> "Mr. Sklar: Objected to, Mr. Examiner, on the ground that this charge applied to August 2nd and has nothing to do with the contract of September 20th.
>
> Mr. Mann: It talks about individual contracts, and they offered in evidence a contract.
>
> Mr. Sklar: The contracts referred to are the ones mentioned by Mr. Sanford on July 29th.
>
> Mr. Graham: In order to get the right effect, we are going to let these in. Complaint embodies none of these contracts."

Section 10(e) of the Act does not require the objection to be framed in any particular form. Obviously, the requirements of the statute are fulfilled if the matter is called to the attention of the Board, or its agent, during the course of a colloquy or debate of counsel, as was done in this case. Mr. Sklar had distinctly stated that the charge "applied to August 2nd and has nothing to do with the contract of September 20th", and the clear import of that statement is that any occurrences or matters occurring subsequent to the date of the charge could not be the subject of action by the Board. This is in exact conformity with petitioner's claims outlined in Point I of its main brief.

The Board's claim on this point is untenable for another equally conclusive reason. In the proceedings before the Circuit Court, petitioner urged its contentions relating to lack of jurisdiction as it does now. The Board interposed the same objection under Section 10(e) of the Act as it does now. The Circuit Court, however, considered and decided petitioner's claim of lack of jurisdiction on the merits (R. 913). Therefore, it is fair to assume that the Board's contention under Section 10(e) was rejected by the Court. The Board has filed no cross-petition for review and therefore is in no position to complain of the Circuit Court's treatment of the applicability of Section 10(e). For this Court now to determine that Section 10(e) precludes consideration of petitioner's claim of lack of jurisdiction would, in effect, constitute a reversal of the Circuit Court on this point without any cross-petition of the Board requesting such relief.

In addition, petitioner duly filed exceptions to the Trial Examiner's Intermediate Report stating that the conclusions and recommendations contained there-

in were "contrary to law and not supported by the evidence" (R. 835).

Second: The remainder of the Board's argument on the jurisdiction question may be summarized as follows:

(a) A comparison between the charge and the complaint reveals almost identical allegations, hence, the complaint "states the charges" as required by Section 10(b) of the Act and Section 5 of the Regulations (p. 67);

(b) That the complaint embodied the "subsequent conduct of petitioner" and the allegations of the complaint are the same as the charge "chronologically extended to the date of the issuance of the complaint." (p. 68);

(c) Whatever variance may exist between the charge and the complaint raises no question of due process of law since it is the complaint and not the charge which puts a respondent on notice of the respects in which he is asserted to have infringed the Act (pp. 66, 67).

These averments are all based on serious misconceptions of the facts, the pleadings and petitioner's claims in respect thereto. Petitioner makes no claim that this complaint fails to state the charges or that there was any variance between the complaint and the charge. On the contrary, we admit that the allegations of unfair labor practices contained in the charge of August 2nd, 1937 were substantially stated in the complaint (see Petitioner's Main Brief, p. 22), but assert that *these were not the same unfair labor practices which ultimately the Board found petitioner had committed.*

The confusion apparent in the Board's treatment of this subject is due in part to a failure to separate the sequence of events, namely—those occurring prior to August 2nd, 1937, the date of the charge, and those occurring subsequently. The *prior* events only were the subject of the charge and the complaint. The *subsequent* events were not put in issue by the pleadings or at the hearing—yet the Board's order dealt exclusively with them and ignored the occurrences alleged in the pleadings, except in a single instance, shown below.

Did the complaint, issued October 7th, 1937, include the events of September, 1937? The answer is easily found and it is an emphatic "No". The relevant portions of the complaint (R. 776-778) disclose the following:

Paragraph 5 alleges petitioner's failure to bargain with the Union on July 29th, 1937 and thereafter. This alleged violation of Section 8(5), related to matters occurring prior to August 2nd, 1937 and the Board's authority to act with respect thereto is not disputed by petitioner.

Paragraph 6 provides, in part: "Respondent, by its officers and agents *on or about July 16, 1937*, * * * did form or sponsor a labor organization or plan * * * Said respondents have dominated and contributed to the support of and interfered with the administration of *said* labor organization or plan down to and including the date of the issuance of this complaint * * *"

Clearly, this paragraph of the complaint relates only to a labor organization formed on July 16th, 1937. The domination thereof, "down to and including the date of the issuance of this complaint",

specifically refers to "said labor organization", *i. e.*, the organization formed on July 16th, 1937. The Board, in support of this allegation, offered testimony at the hearing of a labor organization that was purported to have been created during July, 1937. That testimony conclusively established, however, that no such organization ever existed. We need quote only a few sentences of the Board's main brief on this subject.

> Page 14: "Supervisory employees also spoke, urging the employees to accept Sanford's suggestion (R. 873; 326-330, 297-301, 349-351), *but the proposal was rejected* (301-305, 359)."
>
> Page 16: "There is evidence that Dorsey was present when a number of signatures were obtained (R. 876; 309, 357-358). The petition eventually came to Healey, petitioner's assistant secretary, *who destroyed it* (R. 461)."

With regard to the contracts, the relevant portions of paragraph 7 of the complaint are as follows:

> "Respondent, by its officers and agents while engaged at said Brooklyn Plant as described above, from on or about *July 15, 1937*, down to and including the date of the issuance of this complaint, * * *; has made signing of individual contracts a condition of employment; * * *"

It is to be noted that in this paragraph, signing of individual contracts is not specifically limited, in point of time, to July 17th, 1937. But any uncertainty on this score is eliminated by the succeeding paragraph of the complaint. Paragraph 8 thereof states:

> "On August 2, 1937, respondent's employees

in said Brooklyn Plant went on strike because of respondent's acts described above in paragraphs 5 to 7 inclusive * * *"

One of respondent's acts "described above" in paragraph 7 was the imposing of individual contracts, and if the employees, on August 2nd, 1937, struck on that account, it is obvious that the signing of contracts, according to the complaint, must have taken place between July 17th, 1937 (as alleged in paragraph 7) and August 2nd, 1937 (as alleged in paragraph 8). This was the understanding of counsel during the hearing for Mr. Sklar, the Union attorney said: "The contracts referred to are the ones mentioned by Mr. Sanford on July 29th" (R. 380) and Board's counsel stated that "Complaint embodies none of these contracts" (R. 381).

So, it is clearly evident, despite the Board's assertions to the contrary, that the complaint does not pretend to include the contracts that were executed in September, 1937.

What, then, did the charge and the complaint, in mentioning "contracts", purport to include? It is sufficient to refer to the Board's main brief which, after reciting an occurrence on "July 19th, or 20th", states that on the following afternoon Sanford, petitioner's president, conferred with employees (p. 15).

> "Sanford then stated that petitioner proposed to grant, beginning July 1, 1938, a 5-percent wage increase, time and one-half for overtime, and one week's vacation with pay (R. 876; 301-303), and asked the employees to contact the other workers and then come down and see him again (R. 303). *The employees were dissatisfied with the offer, and it was dropped* (R. 876; 305)."

This was the so-called "contract" alleged in the charge and the complaint. It never had any existence and the Board made no order with respect to it.

Not only did the charge and complaint fail to include either the September Committee or the September contracts, but the Board never raised an issue concerning them during the course of the hearing. The record shows that on October 15th, 1937, the Board completed its case and rested (R. 393). Board's counsel had made no attempt to go beyond the pleadings for he did not offer in evidence the petition (R. 866 a) whereby the employees had designated the Committee.

Thereafter, on October 18th, 1937 (R. 433), during the presentation of *petitioner's case in defense,* the employees' petition was offered and received into evidence—not by the Board—but by petitioner itself (R. 575). It was offered by petitioner in connection with the only issue properly before the Board, to wit: the charge under Section 8(5) of the Act that petitioner had failed to bargain collectively with the Union in July, 1937. In view of the fact that the employees had expressly stated in their petition that "the authority given to our fellow workers to represent us in collective bargaining supersedes any authority that any of the undersigned may have given to any other group, organization or individual", it was absolutely necessary for petitioner to prove to the Board that the Union no longer represented the employees so as to enable it to arrive at a correct determination of the Section 8(5) issue.

Likewise, the record shows that the September contract was never offered in evidence by Board's counsel. It was marked for identification only (R. 374), and then petitioner's counsel voluntarily stipu-

lated to offer the same into evidence "by consent" (R. 385), and the contracts were thereupon received in evidence.

Petitioner's answer alleged as a defense to the proceedings the existence of the Committee and the contracts (R. 794, 795), and it was essential for petitioner, in support thereof, to offer in evidence the requisite documentary proof on those subjects. But the Board did not thereupon acquire any rights of affirmative action—to disestablish the Committee or to seize upon and destroy the contracts—when neither the charge nor the complaint raised any issue as to their validity. (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 235).

The Validity of the Contracts and the Failure to Give the Committee and the Employees Notice of the Proceedings in Respect Thereto.

The Board makes little or no pretense of defending its failure to give notice and hearing to the individual employee parties to the contract, for in truth there is no excuse that may be submitted for its arbitrary procedure in this regard.

Instead, the Board concentrates almost solely on the position of the Committee as a party not entitled to notice and expends much effort in an attempt to extend the principle of the *Pennsylvania Greyhound* case to the facts at bar, notwithstanding the fact in the *Consolidated Edison* case this Court declined to apply that principle where contracts were involved.

It is true that in the *Consolidated Edison* case the labor organization was not found by the Board to be dominated by the employer, whereas here the reverse

is true. But lack of employer domination was not the decisive factor on which that decision was based. The important element there was the presence of contract rights in the labor organization which this Court held could not be extinguished without notice under the "plainest principle of justice", 305 U. S. 197, 233.

Notice to the company-dominated union—in proceedings leading to its non-recognition by the employer—was held not necessary in the *Pennsylvania Greyhound* case on the ground that the order did not run against it and its presence was not necessary for appropriate action by the Board, 303 U. S. 261, 271. The rule is not operative when contracts are involved and the proceedings eliminate in their destruction (*Consolidated Edison* case). The point of distinction between the two cases rests primarily upon the nature of the interest of the labor organization in the controversy and the degree to which the Board's order may affect it, and not on its status as a free or dominated organization.

If domination by the employer, or lack of it, was the sole standard or criterion by which the rights of a labor organization to notice and hearing are to be measured, it is obvious that the results would be flagrantly unjust, and represent nothing less than the infliction of a penalty or punishment upon that labor organization. In the *Pennsylvania Greyhound* case notice to the labor organization was deemed unnecessary—not because it was sponsored or dominated by the employer—but because the Board's order did not directly affect it. Where however, a labor organization possesses contract rights, even if it be found by the Board to be dominated by the employer,

it has the identical interest in the controversy and is affected by the result of the Board's order to the same extent as a free organization; hence it is entitled to the same rights of notice and hearing accorded the other, notwithstanding the pendency of a charge of company-domination.

Apart from the rights of the Committee to notice and hearing, there is no excuse or defense for the Board's denial of those rights to the individual employee parties to the contracts, and as to them the order cancelling their individual contracts is manifestly invalid.

The principle of the *Consolidated Edison* case was recently applied in *National Labor Relations Board* v. *Cowell Portland Cement Co.* (C. C. A., 9th) (Nov. 28, 1939—No. 9092). There the Board cancelled a closed shop contract that had been executed by the employer with a union of his employees, and failed to give the union or the employees any notice of the proceeding. The Court held:

> "Nor is there merit in the contention that the A. F. of L. employees may be deprived of their property rights because what the Board calls 'substantial justice' has been done. We do not perceive the validity of such a conclusion before the A. F. of L. employees or their union have been afforded an opportunity to present their case. Substantial *injustice* may be done if the laborer is not permitted to defend his contract.
>
> "Similarly, there is no merit in the Board's contention that it has proved the A. F. of L. contract to be 'illegal'. To us, in the absence of the A. F. of L. Union or any of its members as parties defending their contract, proof of illegality is as meaningless to cause us to invalidate

the contract as an argument that with a record showing neither apprehension nor plea of an accused we should sustain a judgment of his conviction because the record contains strong and uncontradicted evidence of guilt.

* * * * * * * *

"We hold that the Board had neither jurisdiction of the subject matter of the A. F. of L. employees' contract nor of the persons of such employees or their union and, hence, that that portion of the Board's order requiring the respondent to cease and desist in the performance of the A. F. of L. contract is invalid."

The Board suggests that the Committee or the employees could have intervened in the proceedings before it or filed a petition for review of the order as a "person aggrieved" in the Circuit Court of Appeals. The contention is devoid of all merit. The same arguments were urged by the Board in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 234, and there rejected by this Court (accord: *National Labor Relations Board* v. *Sterling Electric Motors, Inc.*, C. C. A. 9th; No. 9209; Jan. 9, 1940). The Board's position here is even weaker than it was in the *Consolidated Edison* case, for nowhere in this record is there to be found a single fact or inference from which it can be deduced that either the Committee or the employees had any knowledge, actual or constructive, of these proceedings, or of the pleadings or prayers of the parties sufficient to apprise them that their interests were involved.

The Board's attack upon the validity of paragraph "Seventh" of the contract is fully answered in our

main brief (pp. 33-36). We have further corroboration of the lawfulness of the provision whereby the employees agreed not to demand a signed agreement with any union (R. 854), supplied by the recent decision of *Republic Steel Corporation* v. *National Labor Relations Board* (C. C. A., 3rd), 107 Fed. (2d) 472, 478, where the Court held:

> "Republic vehemently contends that the strike was caused solely by its refusal to sign the contract submitted by the S. W. O. C. This refusal the Board concedes was not an unfair labor practice."

At pages 41 to 42, the Board discusses the question as to whether employees may waive their rights under Section 7* of the Act and states flatly that such rights "are not susceptible of being 'waived' by employees", and that "no one may 'waive' a right which has been granted, not as a personal privilege but in furtherance of a valid public policy".

As we stated in our main brief, the employees, in executing the individual contracts, did not renounce a single right or benefit granted by the Act—though even if they had done so, public policy would not thereby have been violated (p. 44). We raised the point in order to rebut inferences to the contrary propounded by the Board.

On this subject it may be observed preliminarily that in modern times employees have always possessed the right to join and form labor organizations

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* "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

and to bargain collectively with their employer. *American Steel Foundries* v. *Tri-City Trades Council*, 257 U. S. 184, 209; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33.

Section 7 merely re-stated this principle and granted no more to employees than that which had been enjoyed by them for a long time prior to its enactment. Other parts of the Act implement Section 7 by setting up machinery for the assistance and protection of those employees who may desire to assert the rights specified in that section; but as we previously stated, such rights are permissive and not mandatory, and may therefore be waived.

It is a matter of common knowledge that the vast majority of employees in this country have not joined labor organizations and do not bargain collectively. These employees are, by their inaction, necessarily waiving the rights outlined in Section 7, yet no one would assert that their failure to exercise those rights is in violation of the policy of the Act, or is in any way unlawful. There is, naturally, no legal difference between a free and voluntary waiver affirmatively made by contract, and one arising through passivity. Since an employee is free to choose whether to accept or reject the benefits provided in Section 7, it is plain that the exercise of that choice cannot affect or involve any considerations of public policy. The Board's argument to the contrary, carried to its ultimate conclusion, would require a holding that Section 7 of the Act is compulsory and imposes an obligation on employees to join labor organizations and bargain collectively, irrespective of their wishes in the matter,—a result which Congress certainly never intended.

Our views here expressed have received judicial approval. In *National Labor Relations Board* v. *Sterling Electric Motors, Inc.* (C. C. A. 9th, Jan. 9, 1940, No. 9209), the Court said:

> "The third alternative for the small plant seems almost ignored in the titanic struggle for power of nation-wide internationals and associations, though the right to choose it is as worthy of the consideration of courts and legislatures as either of the other two. That is the right not to join or create or assist any labor organization at all, but to deal individually with the employer.
>
> * * * * * * *
>
> "In a proceeding seeking to destroy a labor organization we do not interpret the intent of Congress in enacting the Labor Board legislation to have established any presumption that employees are always to be deemed to be aiding a violation of the act if they prefer no organization and decline to create one."

Our arguments on this subject, we hasten to add, are not meant to imply that an employer can, by contract or otherwise, escape the consequences of any unfair labor practices listed in Section 8 and committed by him. That section, unlike Section 7, sets forth no personal rights; it specifies certain acts of an employer that constitute violations of national law and these violations are the exclusive concern of the Board and the Courts and cannot be adjusted or waived by the acts of private parties. Section 10(a) of the Act (see Appendix—Board's Brief, p. 76). It is in respect to Section 8 and other related sections in the

Act that the "public authority" referred to in the Board's brief exists, and not in respect to the long-established private rights re-stated in Section 7.

CONCLUSION.

It is therefore submitted that petitioner has amply demonstrated both in its main and reply briefs that on the facts in this record and on the principles of law applicable thereto, there is no basis for the decision of the Court below, which modified and enforced the order of the Board finding the petitioner guilty of violating Sections 8(1), (2) and (5) of the Act. The cease and desist provisions and the affirmative directions contained in the order of the Circuit Court of Appeals (R. 914-917) are therefore erroneous and should be reversed in all respects.

Respectfully submitted,

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